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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1050

B. W. COYLE, et al.,
PETITIONERS,

v.

W. B. SKIRVIN, et al.,
RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

FRED P. BRANSON,
Muskogee, Oklahoma,

D. I. JOHNSTON,
Oklahoma City, Oklahoma,

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IN THE

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No. 1050

B. W. COYLE, C. G. LONG, MARY ST. CLAIR, SEWELL & SEWELL, a co-partnership composed of L. N. SEWELL and ---- ----. SEWELL, ALBERT ZEPP, CHAS. W. LENOU, R. E. HOBBS, PERRY C. BURKS, CRAWFORD M. JAMES, W. S. JAMES, T. M. JAMES, HELEN JAMES DUNLAP, and VASSIE JAMES HILL, et al,

PETITIONERS,

v.

W. B. SKIRVIN, Individually and as President; O. W. SKIRVIN, Individually and as Vice-President; M. A. LUTY, Individually and as Secretary-Treasurer, and ELLSWORTH JORDAN and F. C. WALLOWER, Individually and as Members of the Board of Directors, respectively, of American Oil and Refining Company, an Oklahoma Corporation: MRS. PEARL R. MESTA, MRS. GEORGE TYSON, formerly MRS. M. S. ADAMS; TEXHOMA REALTY COMPANY, SKIRVIN OPERATING COMPANY, SKIRVIN HOTEL, Incorporated, and BROADWAY DEVELOPMENT COMPANY, Oklahoma corporations,

RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF FACTS

The statement of facts contained in the opinion of the United States Circuit Court of Appeals for the Tenth Circuit (Transcript pp. 240, et seq.) is accurate and complete. That contained in the statement of issues in the petition (pp. 3, et seq.) is not complete. It is also argumentative and filled with conclusions to which the respondents do not agree. No further statement of facts will be made herein except in connection with the specific points hereinafter briefed.

PROPOSITION OF LAW INVOLVED

The question involved in this case and that decided by the Circuit Court of Appeals for the Tenth Circuit is: Is a corporation, or its receiver or successor trustee as the case may be, a necessary and indispensable party in a derivative action instituted by minority stockholders against directors and majority stockholders allegedly guilty of misfeasance?

This proposition might perhaps be stated: Do the plaintiffs in this action have the right or authority to prosecute and maintain this action after the appointment of a receiver or successor trustee of the corporation, without first obtaining permission of the court having jurisdiction over the corporation and without making such receiver or

successor trustee a party? It might perhaps be stated as an inquiry into whether or not a cause of action was vested in the plaintiffs at the time the respondents' motion to dismiss was filed. There are other corollary questions involved to a lesser degree, but all of them become relatively unimportant after a decision is made on the primary proposition.

REASONS FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI

Respondents submit that the decision of the Circuit Court of Appeals for the Tenth Circuit is consonant with decisions in substantially similar cases rendered by Circuit Courts of Appeals for other circuits. The decision does not involve an important question of local law in conflict with applicable local decisions. There is no particular federal question involved; but if it should be determined that there is involved any question of federal law or practice, the decision is in harmony with decisions of the Supreme Court of the United States.

FALLACY IN PETITIONERS' POSITION

1.

The petitioners have not distinguished between a situation where a receiver is appointed as ancillary to the litigation and one in which the cause of action is vested in the receiver or a successor trustee. For example, in a mortgage foreclosure case, a receiver may be appointed to collect rents, pay taxes and insurance premiums, and to hold the net proceeds for the party eventually entitled thereto. He

is not a necessary or even a proper party to the proceedings. Where a receiver or successor trustee of a corporation has been appointed, and the corporation has or asserts a claim against third parties, the cause of action is vested in the corporation, which acts through its receiver, or is vested in the successor trustee of the corporation. The cause of action must be prosecuted by such receiver or successor trustee, or at least such receiver or successor trustee must be a party to the litigation so that any judgment rendered therein against third parties will bind the corporation or its successor trustee.

In the case at bar, the action was instituted and prosecuted by minority stockholders, although a successor trustee designated as receiver had been appointed for the corporation in a state court, and although at a subsequent date a general equity receiver was appointed for the corporation in federal court. At no stage of the proceedings was any attempt made to join the corporation or any representative thereof as a party.

2.

There are two corporations by the same name, one a Nevada corporation and the other an Oklahoma corporation. A receiver was appointed for the Nevada corporation and at a subsequent date the Oklahoma corporation was made a defendant in that action and the same individual was appointed as a receiver for the Oklahoma corporation. The case at bar is a suit by minority stockholders of the Oklahoma corporation. They insist that the receiver of the

Nevada corporation is not a necessary party and have more or less predicated their argument upon that proposition. We readily agree that the receiver for the Nevada corporation is not a necessary party except insofar as the rights or property of the Nevada corporation may be involved. Respondents insist however, that the same individual as receiver for the Oklahoma corporation is a proper and necessary party in all litigation wherein the rights of the Oklahoma corporation may in any respect be involved.

The error into which petitioners have fallen is in overlooking the fact that the same individual is receiver for both corporations. The petitioners habitually refer to such receiver as "the receiver for the Nevada corporation" when, insofar as this case is concerned, he is the receiver for the Oklahoma corporation. There should have been no confusion on this score because the respondents said in their appellees' brief in the Circuit Court:

> "It is almost impossible to conceive of any practical or effectual termination of this controversy favorable to the plaintiffs without interference with the receiver of the Nevada corporation, in a real and practical sense. It is also rather difficult to conceive of the attempted re-exchange of stock of the Nevada corporation for stock of the Oklahoma corporation without directly affecting distribution of the assets in the hands of the receiver of the Nevada corporation after creditors are paid. Yet, in order that there may be no confusion and so that the propositions involved may be reduced to their essentials, we will, for the purpose of this brief, continue to ignore the Nevada corporation and its receiver, thus disposing of many of the contentions contained in the plaintiffs' brief."

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Many of the propositions of law cited in petitioners' brief (pp. 20, et seq.) are concurred in by respondents. Most of them are identical with the contentions made in the petitioners' brief in the United States Circuit Court of Appeals for the Tenth Circuit. There the respondents likewise stated in their brief that they did not contest such statements of law, because most of them were either self-evident or wholly immaterial.

The opinion of the Circuit Court is not in conflict with such propositions of law, but so that there may be no confusion, the respondents state that they do not contest the correctness of the statements contained in Proposition 1 (p. 20), Proposition 2 (p. 21), Proposition 3 (p. 22), Proposition 4 (p. 23), Proposition 5 (p. 24), Proposition 6 (p. 24), Proposition 7 (p. 25) and Proposition 8 (p. 25) insofar as it concerns the Oklahoma corporation or its property.

The petitioners have failed to meet the argument presented by the respondents in their motion to dismiss petitioners' second amended complaint and supplement thereto. The District Court, as well as the Circuit Court, held in their respective opinions (T. 221 and 240) that where the action was for the benefit of the corporation, the receiver or the successor trustee of such corporation was a necessary party. In petitioners' brief they do not squarely meet this

issue, nor do they distinguish, explain, nor attempt to distinguish or explain the authorities upon which the District and Circuit Courts relied in their respective opinions.

It is conceded here that neither the Oklahoma corporation nor its receiver, nor its successor trustee, was made a party to this action and that the petitioners never even asked the court to make any of them parties. This is the issue upon which the opinion of the Circuit Court turns and the petitioners have not attempted to meet it. The argument of respondents in summary form is as follows:

The American Oil & Refining Company, an Oklahoma corporation, was incorporated on February 5, 1916. The American Oil & Refining Company, a Nevada corporation, was incorporated on May 14, 1934. All of the tangible assets and many of the intangible assets were transferred by the Oklahoma corporation to the Nevada corporation, and a majority of the stockholders of the Oklahoma corporation exchanged their stock for stock in the Nevada corporation. Some of the stockholders did not, and such transfer of such assets is admittedly invalid.

On March 19, 1938, a creditor of the Nevada corporation instituted an action against it in the United States District Court for the Western District of Oklahoma in cause No. 2050, and A. C. Fletcher was appointed as receiver for the Nevada corporation in that proceeding. He duly qualified and took possession of all of the books, records and assets of the Nevada corporation.

On April 11, 1938, some of the petitioners, as minority stockholders of the Oklahoma corporation, instituted an action in the state court against the respondents alleging in substance that some of the defendants, constituting the last board of directors of such corporation, were trustees of the expired Oklahoma corporation; that the respondents were majority stockholders or had profited from the mismanagement of the Oklahoma corporation. As the Circuit Court of Appeals succinctly stated:

> "The action was a stockholders suit, a derivative action. The gravamen of the complaint is injury to the corporation."

On April 14, 1938, the state court appointed E. F. Lester as a receiver to exercise "the power heretofore vested by law in said trustee so that the duty which devolved by law upon them as such, may be fully performed." On the following day, E. F. Lester qualified, but he never took into his possession any assets of the Oklahoma corporation.

On April 29, 1938, the former officers and directors of the Oklahoma corporation filed with the Secretary of State of Oklahoma, amended articles of incorporation extending the life of the corporation for a period of 20 years from February 5, 1936.

On May 11, 1938, the present case was removed to the United States District Court for the Western District of Oklahoma. E. F. Lester obviously continued as receiver for the assets, or as statutory successor to the Oklahoma corporation.

After the Oklahoma corporation had been revived, it was made a party defendant in case No. 2050 and on June 14, 1938, A. C. Fletcher was appointed as receiver for the revived Oklahoma corporation.

If the Oklahoma corporation could not be revived, as petitioners contend, then E. F. Lester as successor trustee continued as the representative of the corporation until his death in 1940. If the Oklahoma corporation was revived, as respondents contend, then beginning on June 14, 1938, A. C. Fletcher was the receiver of the corporation. Whatever the construction placed upon the Oklahoma statutes or upon the language of the order appointing E. F. Lester, and whatever else may be in conflict or dispute, the fact still remains that at no time was the Oklahoma corporation, A. C. Fletcher as receiver of the revived Oklahoma corporation, E. F. Lester as successor trustee of the expired Oklahoma corporation, or E. F. Lester as receiver for the assets of the expired Oklahoma corporation, made a party plaintiff or defendant in this case. One or the other had vested in him the alleged cause of action against the respondents. Emphatically such cause of action was not vested in the petitioners who are minority stockholders, either from and after the time the Oklahoma corporation was revived, or from and after the time that Messrs. Fletcher and Lester qualified pursuant to their respective appointments.

A corporation's causes of action belong to the corporation, not to its stockholders. A corporation is con-

trolled by its Board of Directors, and if the corporation's causes of action are against wrong-doing directors who refuse to sue themselves, minority stockholders may institute an action and if successful the benefits thereof flow to the corporation, not to the stockholders. When a receiver is appointed by a court, the rights of such minority stockholders to enforce the corporation's rights cease. The corporation (or its property, if dissolved) is now represented by and controlled by a disinterested person who has no hesitation in instituting an action against a wrong-doing director. If the minority stockholders disagree with the receiver's decision not to institute an action against directors for alleged wrong-doing, minority stockholders may appeal to the court appointing the receiver, and if they make out a prima facie case, the court may order the receiver to institute such action as may be proper, or may discharge him and appoint another receiver. The petitioners apparently wish to take unto themselves rights and causes of action not belonging to them, and to exercise their judgment or discretion as to the conduct of litigation, instead of permitting the receiver to determine what shall be done.

The authorities that we cite below sustain the two following propositions:

1. The right of minority stockholders to institute and prosecute an action is a derivative right and ceases when a receiver or other unbiased or disinterested person or persons is, or are, placed in charge of the corporation.

2. A receiver of a corporation is the sole person who may prosecute an action for and in behalf of a corporation for which he has been appointed receiver.

A minority stockholder's derivative right to maintain an action is a secondary right predicated upon a primary injury to the corporation and upon there being no unbiased, unprejudiced representative of the corporation to prosecute the action in the name of the corporation for damages for the injury sustained. Here, A. C. Fletcher was appointed as receiver of both the Nevada and Oklahoma corporations, by the United States District Court. E. F. Lester was appointed as a statutory successor to the corporation by the state court. After the case was removed to the federal court no order was made discharging him, although when A. C. Fletcher was appointed as receiver for the Oklahoma corporation, such order probably had the effect of relieving E. F. Lester of any further responsibility. On the appointment of these gentlemen, the minority stockholders' predicate was gone. There were unbiased and unprejudiced individuals who could prosecute for and in behalf of and in the name of the Oklahoma corporation, revived or in the stead of the Oklahoma corporation expired, such causes of action as the Oklahoma corporation might have.

The petitioners have not seen fit to request that this action be prosecuted by such receiver or successor trustee. They did not even request that they be made a party plaintiff or defendant. The present action, if prosecuted to an

ultimate conclusion, would not bind the Oklahoma corporation nor its representatives. If the present action were tried on its merits and the respondents be successful, there would be nothing to prevent the Oklahoma corporation or the receiver appointed therefor, from bringing a similar action at a later date. Respondents' position is supported by the following cases:

Klein v. *Peter*, 284 Fed. 797 (CCA 8);
Klein v. *Peter*, 286 Fed. 362 (CCA 9);
Kelly v. *Dolan*, 218 Fed. 966 (D.C. E.D. Pa);
Long v. *Stites*, 88 Fed. (2d) 554 (CCA 6);
Thompson on Corporations (3rd Ed.) Vol. 6, p. 486;
Porter v. *Sabin*, 149 U. S. 473, 13 S. Ct. 1008, 37 L.ed. 815;
Craig v. *James, et al.*, 75 N.Y.S. 813;
Planten v. *Nassau National Bank*, 160 N.Y.S. 297;
Reagan v. *Midland Packing Co., et al.*, 8 Fed. (2d) 954 (CCA 8);
Wales v. *Jacobs*, 104 Fed. (2d) 264 (CCA 6);
Swope v. *Villard*, 61 Fed. 417 (C.Ct. S.D. N.Y.);
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Jacobson v. *General Motors Corp.*, 22 F. Supp. 255 (D.Ct., S.D., N.Y.);
Cunningham v. *Wechselberg, et al.*, 105 Wis. 359, 81 N.W. 414;
McTammany v. *Day, et al.*, 23 Idaho 95, 128 Pac. 563;
Williams v. *Halliard*, 38 N.J. Eq. 375;

Scholl v. *Allen*, 237 Ky. 716, 36 S.W. (2d) 353;

Deering v. *Stites*, 257 Ky. 403, 78 S.W. (2d) 46;

Horning v. *Peters*, 202 Mich. 140, 267 N.W. 874;

Hawes v. *Oakland*, 104 U.S. 450, 26 L.Ed. 827.

COMMENTS UPON AUTHORITIES CITED BY PETITIONERS

In this case, there is involved no question of conflicts of jurisdiction or attempted exercise of jurisdiction by different courts. There was nothing pertaining to such a claimed conflict presented to the Circuit Court of Appeals by either side. The argument or suggestion that the federal court attempted to interfere in any respect with the state court is presented for the first time here. That such is not proper, is too well established to require citation of authorities. The facts show, however, that there could not possibly be any conflict. On April 14, 1938, a successor trustee was appointed in the state court for the assets of the expired Oklahoma corporation. The case was removed from the state court to the federal court on May 11, 1938, and at that time E. F. Lester became an officer of the federal court. From that time forth, the federal court might remove him or not, as it pleased. On June 14, 1938, the federal court appointed A. C. Fletcher as receiver for the Oklahoma corporation revived. At no time were there two courts attempting to exercise jurisdiction over the same res.

Therefore, the cases cited on pages 30, 31 and 32 are not in point.

It is submitted that the case of *Loeffler* v. *Federal Supply Company*, 187 Okla. 373, 102 Pac. (2d) 862 authorizes the revival of the expired Oklahoma corporation. The Circuit Court so construed it (T. 246). Whether or not that case is applicable here tends to determine whether the Oklahoma corporation's cause of action, if any, against the respondents was vested in A. C. Fletcher as receiver or in E. F. Lester as receiver or successor trustee, but since neither of them were parties and since neither of them were even suggested as proper parties, the decision on the applicability of the Loeffler case is more or less pedantic.

Petitioners complain that of the cases cited by the respondents, all of them involve situations where the minority stockholders' suit has been instituted after some court has appointed a receiver for the corporation. They state, without reservation, that where the minority stockholders' suit has been first instituted, the subsequent appointment of a receiver in that suit, or in any other suit, has no effect upon the minority stockholders' suit and that they may prosecute it to judgment. They state that, in their research, they have been unable to find any case sustaining the respondents' position and they cite various state court decisions at pages 38, 39 and 40 asserting that such support their position.

They have completely overlooked the leading case of *Adler* v. *Seaman*, 266 Fed. 828 (CCA 8). We state suf-

ficient of the facts in that case for an understanding of the subsequent quotations from the opinion. Seaman, a preferred stockholder of the Union Railway Company, filed his complaint charging waste and maladministration by the past and present directors of the company. He sought removal of the directors, an accounting and the appointment of a receiver. The following year, Adler, a bondholder under a junior mortgage, filed his bill in equity against the company and asked for the appointment of a receiver. In the Adler suit, a receiver was appointed. The court then consolidated the Seaman and Adler cases and ordered that the Adler suit be treated as an intervention in the Seaman case. In passing upon the propriety of the order of consolidation and the order making one case subservient to the other, the court said:

> "It is thus clear that the receiver in the Adler bill would have been a necessary party to any action such as Seaman brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. *The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule.* The receiver is not a party to that suit. He can become such only by an order of the court *(Wilder* v. *City*, 87 Fed. 843, 31 C.C.A. 249, C.C.A. 5th Circuit); 22 Standard Enc. of Prac. 434; High on Receivers (4th Ed.) sec. 258, although he might be made so by such an order *(National Electric Signaling Co.* v. *Telefunken Wireless Teleg. Co.*, 208 Fed. 679, 698, 125 C.C.A. 647). *No application by the receiver or by any one else to have him made party to the Seaman suit has been ruled upon or even filed in the Adler suit.* * * *

"*Upon qualification, the Adler receiver became a necessary party to the Seaman ligitation, because he succeeded to the rights of the corporation to pursue its officers and directors for maladministration.* Such a suit by the receiver would be in course of collecting the corporation assets, and would be ancillary to the main action. *Pope* v. *Railway Co.*, 173 U.S. 573, 19 Sup. Co. 500, 43 L.Ed. 814; *White* v. *Ewing*, 159 U.S. 36, 15 Sup. Ct. 1018, 40 L.Ed. 67; *Porter* v. *Sabin*, 149 U.S. 473, 13 Sup. Ct. 1008, 37 L.Ed. 815; *In re Tyler*, 149 U.S. 164, 181, 13 Sup. Ct. 785, 37 L.Ed. 689; 34 Cyc. 381. Such character of suit assumes no higher standing because brought by a stockholder and pending at the time the receiver was appointed. No good result, but only confusion, could follow by extension of the receivership to the Seaman suit. * * *

"*To repeat, the proper procedure was, by leave of court, to bring the receiver into the Seaman suit as a party, so that the receiver may prosecute the suit, if deemed advisable by the court, or may, as party defendant, be bound by the adjudication.* While it has been questioned whether a stockholder could prosecute such a suit pending a receivership (*Kelly* v. *Dolan*, 233 Fed. 635, 147 C.C.A. 443), we see no reason why such should not be permitted, if leave be secured from the court appointing the receiver to join him as defendant, and this seems to be the effect of the decision in *Porter* v. *Sabin*, 149 U.S. 473, 13 Sup. Ct. 1008, 37 L.Ed. 815, and to accord with justice (*Marcuse* v. *Gin Co.*, 52 La. Ann. 1383, 1394, 27 South. 846; *Brinckerhoff* v. *Bostwick*, 88 N.Y. 52; Id., 23 Hun. 237; Id. 99 N.Y. 185, 1 N.E. 663)."

CONCLUSION

We therefore submit that there is absent in this case any conflict between the various Circuit Courts of Appeals, any important question of local law necessary to a proper decision in this case which in any way conflicts with ap-

plicable local decisions, and any important question of federal law which should be settled by this Court. As a matter of fact, when one has a complete understanding of the questions involved in this case, it will readily be seen that the opinion of the Circuit Court of Appeals for the Tenth Circuit was in accordance with many other decisions of the Supreme Court of the United States and of the various other Circuit Courts of Appeals. We therefore respectfully suggest that the petition for writ of certiorari be denied.

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April, 1942.